Public Prosecutor v Seow Wei Hoong

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–22 OF 2002
RAUS SHARIF, ABDULL HAMID EMBONG AND AHMAD MAAROP JJCA
18 APRIL 2008

Criminal Law — Dangerous drugs — Trafficking — Chemist's evidence — Whether inadequate — Whether inherently incredible — Whether evidence in rebuttal called — Whether learned trial judge misdirected himself

Evidence — Expert evidence — Chemist's analysis of substance — Principles applicable — Whether evidence inherently incredible — Whether evidence in rebuttal called — Whether prima facie case established — Presumption of trafficking — Whether learned trial judge misdirected himself

The respondent was charged with trafficking 370.2g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952. At the close of the prosecution's case, the trial judge was satisfied that the respondent had under his control or in his custody the black plastic bag containing methamphetamine and also concluded that there was no break in the chain of evidence relating to the custody of the exhibits recovered from the respondent. However, the trial judge was not satisfied with the evidence of the chemist. According to the trial judge, the chemist should have taken at least two samples of 50g each of the homogenised crystalline substance for purpose of conducting each of the respective colour tests and quantitative test. Consequently, the trial judge held that the evidence of the chemist had failed to establish conclusively that the respondent was in possession of 50 g or more of methamphetamine and the prosecution was accordingly unable to invoke the presumption of trafficking in order to establish a prima facie case against the respondent. The trial judge acquitted and discharged the respondent without calling for his defence. Hence this appeal.

Held, allowing the appeal:

(1) Based on the authorities it was clear that there was no legal provision which required that at least 10% of the total weight of the substance suspected to be dangerous drugs be taken for analysis as it was for the

chemist to determine the sufficiency of the weight of the sample and, the quantity of the samples to be taken for analysis would depend on the particular circumstances of each case. Further, the process to be used by a chemist was also not laid down in any law or statute. The evidence of the chemist should be accepted as prima facie unless it was so inherently incredible that no reasonable person could believe it to be true or evidence in rebuttal was called (see para 24).

(2) On the facts, it was clear that the chemist had analysed all the white crystalline substance contained in the 11 plastic packets and after subsequent tests of the homogenised samples, confirmed that the samples contained methamphetamine. He was also never questioned about the various tests which he did (see paras 27 & 30).

(3) Considering the chemist's evidence in totality, it could not be held to be inherently incredible. In the absence of any rebuttal evidence by the defence and in the light of the authorities, the learned judge's conclusion on the inadequacy of the chemist's evidence was a serious misdirection, resulting in his erroneous eventual conclusion that the prosecution had failed to establish a prima facie case (see para 31).

[Bahasa Malaysia summary

Responden dituduh mengedar 370.2g methamphetamine, satu kesalahan yang boleh dihukum di bawah s 39B Akta Dadah Berbahaya 1952. Di akhir kes pihak pendakwaan, hakim perbicaraan berpuas hati bahawa responden mempunyai di bawah kawalan atau milikannya beg plastik hitam yang mengandungi methamphetamine dan juga membuat kesimpulan bahawa rangkaian keterangan tidak terputus berkaitan dengan milikan ekshibit yang dijumpai dari responden. Walau bagaimanapun, hakim perbicaraan tidak berpuas hati dengan keterangan ahli kimia. Menurut hakim perbicaraan, ahli kimia tersebut sepatutnya mengambil dua contoh 50g setiap satu bahan berhablur yang dihomogenkan bagi tujuan untuk membuat setiap satu ujian warna dan ujian kuantitatif. Oleh yang demikian, hakim perbicaraan memutuskan bahawa keterangan ahli kimia telah gagal untuk membuktikan secara muktamad bahawa responden mempunyai milikan 50g atau lebih methamphetamine dan pihak pendakwaan oleh itu tidak boleh membangkitkan anggapan pengedaran untuk membuktikan kes prima facie terhadap responden. Hakim perbicaraan membebaskan dan melepaskan responden tanpa memanggilnya untuk membela diri. Maka rayuan ini.

Diputuskan, membenarkan rayuan:

(1) Berdasarkan kepada autoriti, adalah jelas bahawa tidak terdapat peruntukan undang-undang yang memerlukan bahawa

sekurang-kurangnya 10% daripada jumlah berat bahan yang disyaki sebagai dadah berbahaya diambil untuk dianalisis kerana ia adalah terpulang kepada ahli kimia untuk menentukan kecukupan berat contoh dan, kuantiti contoh yang akan diambil untuk analisa adalah bergantung kepada hal keadaan tertentu setiap kes. Selanjutnya, proses yang digunakan oleh ahli kimia juga tidak terdapat dalam mana-mana undang-undang atau statut. Keterangan ahli kimia sepatutnya diterima sebagai prima facie kecuali ia adalah sememangnya sukar dipercayai sehingga seseorang yang berfikiran waras tidak akan mempercayainya sebagai benar atau keterangan yang mematahkan dipanggil (lihat perenggan 24).

(2) Di atas fakta, adalah jelas bahawa ahli kimia tersebut telah menganalisis kesemua bahan berhablur putih yang terkandung di dalam 11 bungkusan plastik dan selepas ujian-ujian kemudian terhadap contoh-contoh yang dihomogenkan, mengesahkan bahawa contoh-contoh tersebut mengandungi methamphetamine. Beliau juga tidak disoal mengenai berbagai ujian yang dijalankannya (lihat perenggan 27 & 30).

(3) Mempertimbangkan keterangan ahli kimia tersebut secara menyeluruh, ia tidak boleh diputuskan sebagai sememangnya tidak boleh dipercayai. Tanpa sebarang keterangan yang mematahkan oleh pihak pembelaan dan berdasarkan autoriti-autoriti, keputusan hakim yang bijaksana terhadap ketidakcukupan keterangan ahli kimia adalah salah arah yang serius, membawa kepada keputusan yang salah bahawa pihak pendakwaan telah gagal untuk membuktikan kes prima facie (lihat perenggan 31).]

Notes

For cases on chemist's analysis of substance, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1414–1417.

For cases on trafficking dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 126–139.

Cases referred to

Chu Tak Fai v PP [2007] 1 MLJ 201 (refd)
Gunalan a/l Ramachandran & Ors v PP [2004] 4 MLJ 489 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Leong Bon Huat v PP [1993] 3 MLJ 11 (refd)
Loo Kia Meng v PP [2000] 3 MLJ 664 (refd)
Munusamy v PP [1987] 1 MLJ 492 (refd)
PP v Lam San [1991] 3 MLJ 426 (refd)
PP v Mohamad bin Ambunani [1994] 4 CLJ 871 (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 37(da)(i), 37(j), 39A(2), 39B(1), 39B(2)

Appeal from: Criminal Trial No 47–02 of 2001 (High Court, Kota Kinabalu)

Suhaimi Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Chao Ching Tang (Chau & Thien) for the respondent.

Ahmad Maarop JCA (delivering judgment of the court):

THE BACKGROUND

[1] The respondent was charged with trafficking in dangerous drugs, to wit, 370.2g of methamphetamine, an offence punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). At the close of the case for the prosecution, the learned judge held that the prosecution failed to establish a prima facie case. Accordingly, he acquitted and discharged the respondent without calling for his defence. Being dissatisfied with the decision of the learned judge, the public prosecutor appealed to us. On 26 November 2007, we heard and allowed the appeal. We made certain consequential orders to which we will refer at the end of this judgment.

THE FACTS OF THE CASE

[2] The brief facts of the case are as follows. At about 9pm on 9 June 2001, the respondent boarded a passenger boat, JN 4231D at Kg Pondo Jetty in Pulau Gaya. There were 12 passengers in the boat that night. The respondent was the last passenger to board the boat, carrying with him a black plastic bag. The respondent sat in front of the boat and he placed the black plastic bag on his lap. Bashir Othman ('PW4'), the owner and skipper of the boat then started the boat and headed for Kota Kinabalu. On the way, at about 9.45pm on the same date, the boat was intercepted by a marine police boat. There were three police officers in the police boat including Lance Corporal Kam Khew Chai ('PW3'). While the police boat was alongside the boat, PW3 and another police officer inspected the documents of the passengers. Three passengers were found to be without documents and were ordered to board the police boat. PW3 noticed that when it was the respondent's turn to hand over his documents, the respondent gave his identity card without raising his head. At that time the respondent appeared to PW3 to be nervous and frightened. PW3 also saw the respondent pushing the black plastic bag with his foot. On being ordered by PW3, the respondent stood up and in the process of standing up, the respondent again pushed the black plastic bag

with his foot. PW3 retrieved the black plastic bag which was then beside the respondent's foot. PW3 opened the bag and saw a 'TOFFIFEE' chocolate box. PW3 opened the chocolate box and found in it a transparent plastic packet containing crystalline substance suspected to be syabu. PW3 also saw another plastic bag containing money in the black plastic bag which he did not count. The respondent was detained. PW3 then handed the black plastic bag and the respondent to Corporal Jaafar Yahaya ('PW2'). PW2 brought the bag and the respondent to the Marine police jetty. At about 12.50am on 10 June 2001, PW2 handed the respondent and the black plastic bag to the investigation officer, Inspector Zulfakar Abdul Aziz ('PW7'). On inspection, PW7 found the black plastic bag to contain a plastic bag containing RM30,900 and a 'TOFFIFIE' chocolate box. In the chocolate box, PW7 found 11 plastic packets containing crystalline substance. The Government Chemist ('PW1') confirmed the crystalline substance in the 11 plastic packets to contain a total of 370.2g of methamphetamine, a dangerous drugs under the Act.

DECISION OF THIS COURT

[3] It is clear to us that after having considered the evidence adduced by the witnesses for the prosecution, the learned judge had arrived at an express affirmative finding of possession without relying on legal presumption under the Act. On the evidence adduced by the prosecution, he was satisfied that the respondent had under his control or in his custody the black plastic bag. He was also satisfied that the respondent knew that there was methamphetamine in the bag. In his judgment the learned judge held:

> From the evidence which I have set out the accused was in physical possession of the black plastic bag. That he carried it on board, placed it on his lap and later by his feet is sufficient evidence that he had control or custody of the black plastic bag as to satisfy those ingredients constituting possession. There is still another vital ingredient which is that the accused knew there was methamphetamine inside the black plastic bag. That goes to the state of his mind which can only be gathered from the surrounding circumstances. The accused had tried to make himself as unnoticeable as possible by not even lifting his head when handing over his identity card to the police officer feeling, no doubt, sorry for himself and frightened for having to face the police officer. He was acting sheepishly. Normally, one only feel frightened when face to face with the law if one harbours the feeling of having done something wrong which is about to be exposed. Then there is the attempt to disassociate himself from the black plastic bag through his attempt to push it away with his foot. That behaviour of the accused shows that there is something incriminating in the black plastic bag and he knows about it. In my view the accused knew what was inside the black plastic bag and it was methamphetamine.

[4] Upon considering the evidence available to us in the appeal record we are satisfied that the learned judge was correct in arriving the aforesaid finding of fact. The learned judge also concluded that that there was no break in the chain of evidence relating to the custody of the exhibits recovered from the respondent. That, in our view is also the right conclusion to make considering the evidence available in this case.

[5] However, the learned judge was not satisfied with the evidence of the chemist (PW1). The learned judge said that he had difficulty in accepting PW1's conclusion that the crystalline substance from the 11 plastic packets in the black plastic bag contained a total of 370.2g of methamphetamine. The learned judge concluded that PW1's evidence had failed to establish conclusively that the respondent was in possession of 50g or more of methamphetamine and that the prosecution was therefore unable to invoke the presumption of trafficking to establish a prima facie case against the respondent. It is this decision of learned judge which gave rise to the appeal by the public prosecutor in this case.

[6] The learned deputy public prosecutor who appeared before us submitted that in his evidence, PW1 had explained how he carried out his analysis and his evidence was never seriously challenged by the respondent, beyond asking clarification as to the accuracy of the weighing machine. Despite that the learned judge concluded that PW1 had failed to examine an adequate quantity of the crystalline substance, since PW1 had not taken at least two samples of 50g of each of the homogenised crystalline substance for the purpose of conducting each of the colour tests and the quantitative test. The learned deputy contended that the said conclusion was not supported by the prevailing authorities. In support he cited the Supreme Court cases of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Public Prosecutor v Lam San* [1991] 3 MLJ 426 and *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265. In the light of those authorities it was the prosecution's contention that the failure of the learned judge to accept the evidence of PW1 regarding the total weight of methamphetamine, in the absence of inherent incredibility and in the absence of any contradiction by rebuttal evidence, was a serious misdirection.

[7] On the learned judge's criticism on the insufficiency of the weight of the sample taken by PW1, the learned deputy urged us to consider the decision of this court in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197.

[8] In his reply, learned counsel for the respondent submitted that on the law as it stood then, the learned judge was right in concluding that the prosecution had failed to establish conclusively that the respondent was in

possession of 50g or more of methamphetamine. Counsel argued that in rejecting PW1's evidence as conclusive proof, the learned trial judge had obviously followed the Supreme Court decision in *Leong Bon Huat v Public Prosecutor* [1993] 3 MLJ 11 and the decision of this court in *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664.

[9] Starting his discussion on PW1's evidence, the learned judge said he accepted PW1's evidence:

> I say the accused knew it was methamphetamine because I accept the testimony of the expert witness Shaari bin Desa that after he had conducted the necessary visual inspection, colour tests (consisting of the *Marquis* test, the *Simons* test and the silver nitrate reagent test), the test using gas chromatography-mass spectrometry and the quantitative test using a gas chromatography with flame ironic detector.

[10] However, the learned judge was not satisfied with PW1's evidence because according to him, PW1 did not take adequate quantity of samples to carry out his analysis. He said in the present case, out of the total of 487 plus grammes of homogenised crystalline substance, PW1 had taken only 0.3523g for the quantitative test. He said 'whilst I have no problem accepting his conclusion on the 0.3523g of samples he took that they were methamphetamine, I have difficulty in accepting his conclusion that the 370.2g of the 487.0928g is methamphetamine'. He further held that PW1 should have taken a least two samples of 50g each of the homogenised crystalline substance for purpose of conducting each of the respective colour tests and quantitative test. He also added that to compound the inadequacy, PW1 also did not weigh the samples taken for the colour test.

[11] It appears to us that in holding that PW1 should have taken two samples of 50g each of the homogenised crystalline substance for the purpose of the colour tests and the quantitative test, the learned judge had relied on his own decision in *Public Prosecutor v Mohamad bin Ambunani* [1994] 4 CLJ 871. In that case he held that it was not sufficient for the chemist to take a sample of 184g (out of 1,669.2g) of cannabis in that case, because he was of the view that since the presumption of trafficking would only arise if a person was found to be in possession of 200g or more of cannabis, 200g of cannabis should have been tested. So, it seems that, in his view, since in this case in order to give rise to the presumption of trafficking, the respondent must be found to be in possession of 50g or more of methamphetamine, at least 50g of the homogenised crystalline substance must be analysed, even if it would take 1½ years to complete that analysis. The learned judge was also of the view that the determination of what constituted an adequate quantity of the samples to be tested would require the weight of the samples to be disclosed which should then be compared with the overall quantity of the substance. In the end, the learned judge said PW1's opinion that a quantitative test of

0.3523g as being sufficient for him to conclude that out of the total weight of the crystalline substance (478.098g), 370.2g is methamphetamine, could only be accepted if his opinion was not examined critically. The learned judge then concluded:

> Having, critically examined the evidence I am of the conclusion that the expert failed to examine an adequate quantity of the crystalline substance. He should have taken at least two samples of 50g each of the homogenised crystalline substance for the purpose of conducting on each the respective colour tests and quantitative tests. As he had failed to weigh the samples for the colour tests and as he had also failed to take a sample of at least 50g for the quantitative test, his opinion that there was 370.2g of methamphetamine cannot be accepted. In the end his opinion has only establish that the black plastic bag contain 0.3523g of methamphetamine ...
>
> In the premises, the prosecution had failed to establish conclusively that the accused was in possession of 50g or more of methamphetamine and therefore is unable to establish the presumption of trafficking resulting in a failure to establish a prima facie case against the accused under s 39B(1)(a) of the Dangerous Drugs Act 1952. The accused is therefore discharged and acquitted of the charge.

[12] We regret to say that we have a different view. We feel that this is where the learned judge had fallen into error. We find that the learned judge's conclusion is not supported by any legal provision or judicial authority. Indeed, as we will show shortly, his conclusion is also against the established principle of the acceptance of chemist evidence in dangerous drugs cases under the Act as decided by the highest court in this country in a number of cases. We will refer to these familiar cases. The starting point is *Munusamy v Public Prosecutor*, where Mohd Azmi SCJ, delivering the judgment of the Supreme Court, said at p 226:

> The fourth ground of appeal is concerned with the expert opinion of the chemist Mr Ng that the substance sent to him for analysis was cannabis as defined in the Dangerous Drugs Act. *We are invited to conclude that Mr Ng's opinion ought not to have been accepted as it was based on defective analysis*. Let us examine the evidence. The chemist report contained the following expert opinion of Mr Ng:
>
> > I examined the package submitted and on analysis found:
> >
> > In package 'A': four newspaper packets containing four hundred paper rolls having a total of 199.3 g (nett) of cannabis;
> >
> > In package 'B': two newspaper packets containing one thousand paper rolls having a total of 450.2g (nett) of cannabis.
> >
> > Cannabis is as defined in the Dangerous Drugs (Amendment) Act 1980.

As to how he came to his opinion, Mr Ng gave, inter alia, the following testimony:

> I conducted physical examination on the materials within the paper rolls. I satisfied myself that all the contents of all the rolls were identical and of similar material. I performed colour test, microscopic examination, and thin-layer chromatography to identify the nature of the material. I found all of them to be cannabis. In package 'A', I found 199.3g net of cannabis. In package 'B', I found 450.2g net of cannabis which to the layman is known as ganja. (Last para of P8 referred). Cannabis is defined as dangerous drug in the Dangerous Drugs (Amendment) Act 1980.

On the above evidence, we find it difficult to appreciate the validity of various criticism levelled at Mr Ng. There was no dispute that Mr Ng had been a chemist with the chemistry department for 12 years. He possessed a BSc degree in chemistry and biology, and had given expert evidence in court, and such evidence had been accepted in the High Court in drug cases. As a rule, a chemist in drug cases does not give any opinion as to ownership, control or possession of the substance sent for analysis, but he merely reports the result of the chemical examination of the substance. The only reason for sending the exhibits to the chemist is to determine its identity and to confirm what other witnesses have suspected. This type of opinion must in our view be distinguished from opinions which are of very technical or complicated nature, such as those given by handwriting, trade mark, copyright or ballistic experts. Without being derogatory it is common knowledge that even animals, such as snuff dogs when sufficiently trained, are able to detect certain dangerous drugs. We are therefore of the view, that in this type of cases where the opinion of the chemist is confined only to the elementary nature and identity of substance, the court is entitled to accept the opinion of the expert of its face value, unless it is inherently incredible or the defence calls evidence in rebuttal by another expert to contradict the opinion. So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory, step by step.

[13] Then came *Public Prosecutor v Lam San*, where at the close of the case for the prosecution, the learned trial judge amended the charge of trafficking in 34.81g of heroin to one of possession under s 39A(2) of the Act. The only reason was because he did not accept the evidence of the chemist in that case on the following grounds:

(a) There was no evidence as to why or how the chemist found the plastic packet to contain 75.18g of greyish brown substance. There was also no evidence as to whether the chemist used an instrument for weighing the substance or if he did so use an instrument, how that instrument worked and whether it was in proper working order and duly serviced.

(b) There was no evidence as to how the analysis was conducted or as to who conducted the analysis to the end that the chemist found the substance to contain 34.81g of heroin.

[14] The learned trial judge in that case also appeared to have a doubt as to the accuracy of the weight of heroin so as to invoke the presumption of trafficking under s 37(da)(i) of the Act. The relevant parts of the evidence of the chemist in that case are as follows:

> SD5: Chang Eng Thuan a/s in English. 44 years old. Director of Chemistry of the State of Johor.
>
> Obtained BSc Hons in Chemistry from UM Chartered Chemist C Chem Awarded Fellow Royal Society of Chemistry FRCS from England. Fellow Malaysia Institute of Chemistry MMIC. Now serving as council member in that Institute. Represented Malaysia to attend the UN Narcotic Expert Group. Served in Department of Chemistry for 22 years. I have testified as expert witness in many court cases. My evidence has all the time been accepted by the court.
>
> All these envelopes sealed with police seal Polis Di RM 178. I examined all the nine exhibits. In envelope A I found a plastic packet in which was a Chinese newspaper packet containing another plastic packet containing 75.18g of a greyish brown substance which on analysis I found to contain 34.81g nett of heroin.
>
> Heroin is a dangerous drug as defined in s 2 of the DDA.
>
> The colour and texture of the contents of ID 8C are different from the time when I carried out the analysis. This is because when I carried out the analysis I had to powder the greyish brown substance into very fine powder for homogeneity of the analysis, to obtain an accurate result.
>
> In this case the % of error of heroin quantitative analysis is + - 1.0567% and I have given full benefit of the doubt to the accused by substituting 1.0567% from the % of heroin which I obtained from my analysis. The error would be positive or negative. We give benefit to the negative error.
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> In cross-examination the chemist said:
>
> > From exh 8C I cannot remember exactly but I think I took out about 10g for the purpose of analysis.
> >
> > There is no record in my work sheet of my having taken out a quantity of the substance for my analysis.
>
> In re-examination he said:
>
> > For the purpose of analysis the practice is to take out more than 10% of the weight of the sample for the analysis.

[15] In allowing the appeal by the public prosecutor, Hashim Yeop Sani CJ (Malaya) held that looking at the evidence of the chemist in totality, the court found it difficult to accept the doubt of the learned trial judge at the close of the prosecution to be a doubt arrived at on a rational basis. The Supreme Court quoted with approval the passage from the judgment of the Supreme

Court in *Munusamy v Public Prosecutor* regarding the acceptance of the chemist evidence on its face value which we have adverted to, and said:

> Two things are implicit in that passage. First, unless the evidence is so inherently incredible that no reasonable person can believe it to be true it should be accepted as prima facie evidence. Second, so long as the evidence is credible there is no necessity for the chemist to show in detail what he did in his laboratory.

[16] The decision in *Munusamy* and *Lam San* on the acceptance of the chemist's evidence on its face value, was affirmed by the Supreme Court in *Khoo Hi Chiang v Public Prosecutor* (see per Hj Abdul Hamid bin Hj Omar LP at p 158).

[17] We come back to *Public Prosecutor v Mohamad bin Ambunani* which was referred to by the learned judge in his judgment in the present appeal, to support his conclusion on the necessity of analysing at least 50g of the crystalline substance. In that case the learned judge had referred to the case of *Leong Boon Huat v Public Prosecutor*. With respect we do not think that case could be an authority to support the proposition decided by the learned judge in *Public Prosecutor v Mohamad bin Ambunani*. Indeed, in *Leong Boon Huat*, the Supreme Court stressed that what would be an adequate quantity of sample to be taken by the chemist for analysis would depend on the particular circumstances of each case. This brings us to the decision of this court in *Gunalan a/l Ramachandran v Public Prosecutor*. In that case learned counsel for the appellants submitted that there was no evidence as to how many random samples were taken by the chemist and what were the weights.

[18] In his judgment, in dealing with the issues raised on the chemist evidence, Abdul Hamid Mohamad JCA (as the Chief Justice then was), analysed the provision under s 37(j) of the Act which provides that:

> (j) when any substance suspected of being a dangerous drug has been seized and such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles and if such analysis establishes that such samples are all of the same nature and description, it shall be presumed, until the contrary is proved, that the contents of all the receptacles were of the same nature and description as the samples so analysed and if such analysis establishes that such samples consist of or contain a dangerous drug, it shall be presumed, until the contrary is proved, the contents of all the receptacles consist or contain the same proportion of such drug.

[19] His Lordship then held that the 10% in s 37(j) of the Act refer to the number of receptacles, not the total weight of the samples taken. Elaborating

on the point, His Lordship also referred to *Lam San*, *Leong Boon Huat* and *Loo Kia Meng*. In respect of *Leong Boon Huat*, after referring to the relevant passage in the judgment of the Supreme Court, the learned Chief Justice said:

> Clearly, the court did not lay down the rule that 10% of the total weight of the plant material must be taken as sample for the purpose of the tests. However, in the circumstances of that particular case the amount taken was found to be adequate by the court. So, I do not think that it is correct to say that the case laid down the principle that at least 10% of the total weight must be taken as sample for the purpose of carrying out the tests. Indeed, I do not think that that case laid down any general principle. *The decision was confined to the circumstances of the case and, as stressed by the court, what would be an adequate quantity would depend on the particular circumstances of each case. Even then, the question is: In the absence of a specific provision of the law, who is to determine what is the adequate quantity that should be taken as sample(s) for the purpose of carrying out the tests? The court or the chemist? Who is the expert? Who carries out the test? The answer must be the chemist.*
>
> With greatest respect, I find that the judgment of the Supreme Court in that case is not an authority for saying that the law requires that 10% of the total weight of the drug must be tested. No reference was also made to *Public Prosecutor v Lam San*. With respect, the judgment seems to focus on the interpretation of the words 'more than 10%' used by the chemist as if it is a statutory provision or a clause in a contract. *The point is, there is no provision whatsoever in the Act which requires at least 10% of the total weight of the substance in question to be taken out for the purpose of analysis.*
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> (Emphasis added.)

[20] In respect of *Loo Kia Meng*, His Lordship said:

> There appears to be a confusion as to the term 10% ie 10% of what? This can be seen in *Loo Kia Meng v Public Prosecutor* [2000] 3 MLJ 664 (CA). In that case dried plant material suspected was recovered from two packages. I shall allow the judgment of Shaik Daud Md Ismail JCA, delivering the judgment of the court do the rest of the talking:
>
> > He testified that he took 20 random samples and after doing the chemical tests he concluded that all the dried plant material to be cannabis as defined in s 2 of the Act. Now under s 37(j) of the Act, the chemist is required to take a minimum of 10% by virtue of s 37(j) of the Act (Emphasis added). We find that when he said he took 20 random samples, it is ambiguous as the 20 samples taken by the chemist represented a fair sample of the total. With respect, we are unable to agree with that submission because the 20 sample could well be much less than the 10% required to be taken. We hold that pursuant to s 37(j) of the Act, the chemist is required to give the actual amount or the actual weight of the samples taken in order to comply with that section.
>
> With greatest respect, the sentence 'Now under s 37(j) of the Act, the chemist is required to take a minimum of 10% by virtue of s 37(j) of the Act' is by itself ambiguous. 10% of what? If, as it appears to be, it is meant to be 10% of the total

A weight, clearly, that is not what s 37(j) says. Neither does the section say 10% of the weight in each receptacle. *Again with respect, I am unable to find any provision in the Act that requires the actual weight of the samples taken must be given in evidence.* All that the section says is that, if 'such substance is contained in a number of receptacles, it shall be sufficient to analyse samples of the contents of a number not less than ten per centum of such receptacles ... ' (Emphasis added). The 10% refers to the number of receptacles, not the total net weight in all receptacles or in each receptacle. This had been made clear by the Federal Court since 1963 in *Au Ah Lin v Public Prosecutor*. It is unfortunate that neither *Au Ah Lin v Public Prosecutor* (FC), nor *Public Prosecutor v Lam San* (SC) was brought to the attention of the court. Even s 37(j) which was mentioned in the judgment was not reproduced for closer scrutiny.

In the circumstances, with greatest respect, I am unable to follow *Leong Boon Huat v Public Prosecutor* and *Loo Kia Meng v Public Prosecutor*. Instead I refer to follow *Au Ah Lin v Public Prosecutor* and *Public Prosecutor v Lam San*.

(Emphasis added.)

[21] At this stage, it is pertinent to add that in a separate judgment in *Gunalan*, Abdul Aziz Mohamad JCA (as he then was) expressed the view that the law does not specify the process which must be used by a chemist in his analysis in determining the identity and the weight of a dangerous drugs. His Lordship said:

> No law or statute has laid down the process which a chemist is bound to use in order to prove the nature of a substance as being or as containing a particular dangerous drug or the weight of the dangerous drug in a bulk of the substance. The process belongs to the realm of science and is devised according to the discipline and principles of science.

[22] The interpretation on s 37(j) of the Act and the proposition that it is for the chemist to determine the sufficiency of the weight of the dangerous drugs required for analysis, which was made in *Gunalan*, was approved by the Federal Court in *Chu Tak Fai v Public Prosecutor* [2006] 4 MLJ 201 where, in delivering the judgment of the court, Nik Hashim FCJ said at p 214:

> In any event it is our view that the ten per centum stipulated in s 37(j) refers to the number of receptacles and not the total weight of the drug found or the total amount or weight of the samples taken for analysis. Section 37(j) only requires the taking of samples from ten per centum of the total number of the receptacles and not the drug. *It is for the chemist to determine the sufficiency of the weight of the drug required for the analysis. This has been lucidly explained in Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2004] 4 MLJ 489 (CA) *with which we agree*.

[23] The principle of acceptance of the evidence of the chemist on its face value was also reaffirmed by His Lordship:

On the sufficiency of the evidence of the chemist, we wish to reiterate that the court is entitled to accept the evidence of the chemist on its face value without the necessity for him to go into details of what he did in the laboratory step by step unless the evidence is so inherently incredible that no reasonable person can believe it to be true or the defence calls evidence in rebuttal by another expert (see *Balachandran, Munusamy v Public Prosecutor* [1987] 1 MLJ 492; *Public Prosecutor v Lam San* [1991] 3 MLJ 426; *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265).

[24] To recapitulate, the principles which, to our mind, are established by the cases which we have adverted to are these:

(1) There is no legal provision which requires that at least 10% of the total weight of the substance suspected to be dangerous drugs, to be taken for analysis. Indeed, there is no provision requiring specific number of samples to be taken for analysis. There is also no provision which requires that certain weight of each sample must be taken for analysis.

(2) What would be an adequate quantity of the samples to be taken for analysis would depend on the particular circumstances of each case.

(3) No law or statute has laid down the process which a chemist must use in order to prove the nature of a substance as being dangerous drugs, or as containing dangerous drugs, or the weight of the dangerous drugs in a bulk substance suspected to be dangerous drugs. The process belong to the realm of science and is devised according to the discipline of science.

(4) It is for the chemist to determine the sufficiency of the weight of the sample(s) of the dangerous drugs which is required for analysis.

(5) Unless the chemist's evidence is so inherently incredible that no reasonable person can believe it to be true, or the defence calls evidence in rebuttal by another expert to contradict his opinion, his evidence should be accepted as prima facie evidence.

(6) So long as some credible evidence is given by the chemist to support his opinion, there is no necessity for him to go into details of what he did in the laboratory step by step.

[25] We turn now to the evidence of the chemist (PW1) in the present appeal. In his evidence PW1 testified that the envelope which he received from PW7, contained a box with the printed words 'TOFFIFEE'. In the box PW1 found 11 packets marked 'A1' to 'A11'. Each of the packets contained white crystalline substance. Using a Sartorius BP 2215 electronic balance,

PW1 weighed each packet together with its contents. The weights which he obtained were:

(1) '(KK)FOR993/01-0-S1'— gross weight 49.7530g — empty packet weights 1.4927g — thus net weight of white crystalline is 48.2603g;

(2) '(KK)FOR993/01-0-S2' — gross weight 49.8055g — empty packet weights 1.4275g — thus net weight of white crystalline is 48.3780g;

(3) '(KK)FOR993/01-0-S3' — gross weight 49.6957g — empty packet weights 1.4276g — thus net weight of white crystalline is 48.2681g;

(4) '(KK)FOR993/01-0-S4' — gross weight 49.8751g — empty packet weights 1.4257g — thus net weight of white crystalline is 48.4494g;

(5) '(KK)FOR993/01-0-S5' — gross weight 49.7283g — empty packet weights 1.4448g — thus net weight of white crystalline is 48.2835g;

(6) '(KK)FOR993/01-0-S6' — gross weight 49.8588g — empty packet weights 1.4504g — thus net weight of white crystalline is 48.4084g;

(7) '(KK)FOR993/01-0-S7' — gross weight 49.7940g — empty packet weights 1.3634g — thus net weight of white crystalline is 48.4306g;

(8) '(KK)FOR993/01-0-S8' — gross weight 49.7770g — empty packet weights 1.4153g — thus net weight of white crystalline is 48.3617g;

(9) '(KK)FOR993/01-0-S9' — gross weight 49.8865g — empty packet weights 1.4421g — thus net weight of white crystalline is 48.4444g;

(10) '(KK)FOR993/01-0-S10' — gross weight 49.7251g — empty packet weights 1.4530g — thus net weight of white crystalline is 48.2721g;

(11) '(KK)FOR993/01-0-S11' — gross weight 4.0241g — empty packet weights 0.4878g — thus net weight of white crystalline is 3.5363g.

[26] According to PW1, the total net weight of all the white crystalline substance from the 11 packets was 487.0928g. PW1 then made visual inspection of all the white crystalline substance from the 11 packets and found all of them to be of the same physical appearance. He then mixed all the crystalline substance and blended them using a commercial blender for about five minutes to homogenise them. PW1 then explained the various tests which he carried out. For convenience the relevant part of his evidence is reproduced below:

> First colour test is a *Marquis* test where I got the result of the presence of amine group in the substance. I followed with the second colour test called *Simons* test and from this test the presence of secondary amine group in the substance is due to methamphetamine. The third colour test uses silver nitrate reagent and I found the presence of hydrochloride salt. For all three colour tests I used a random sample which weight I did not record because it is not necessary.

The second test involved the use of a machine called gas chromatography-mass spectrometry ('GCMS'). Eleven random samples were taken. I did not weigh them as it was not necessary. I tested the GCMS machine before using it and found it to be in good condition. The result of the test is that all eleven samples contain methamphetamine.

Based on the two already done I concluded that the homogenised samples contain methamphetamine hydrochloride and base on that result I carried a further analysis called quantitative analysis using gas chromatography with flame ironic detector ('GC-FID'). I tested the machine before using it and found it to be in good condition. Took 25 replicate and random samples for this test. I weighed those samples and recorded their weight for the purpose of calculating the percentage, that is the purity of the substance. I record the weight in the working papers. [Witness referred to his working papers]. The combine weight of the 25 samples is 0.3523g. One blank 26th sample was used for reference purposes. From the test the substance contained 76.4% of methamphetamine with error of analysis at 0.4%. Base on the calculation I found the substance contain 370.2g of methamphetamine. The tests I conducted were the standard tests used by the department for determining methamphetamine. The examination is also the standard examination used by the department.

[27] Thus, from PW1's evidence it is clear that he had analysed all the white crystalline substance contained in the 11 plastic packets. After finding on examination, that all white the crystalline substance in the 11 plastic packets were of the same physical appearance, PW1 mixed all of them and then blended them using a commercial blender, to homogenise them. In this regard, from his ground of judgment, we find that the learned judge of the High Court was satisfied (and in our view rightly), that all the white crystalline substance (487.0928g) was homogenised. Then, from the homogenised crystalline substance, PW1 took a random sample which he used to carry out the three colour tests. He weighed the sample but did not record it because according to him it was not necessary. Next, he took 11 random samples for the GCMS test. The result of the test was that all the 11 samples contained methamphetamine. From the colour tests and the GCMS test, PW1 confirmed that the homogenised samples contained methamphetamine. Then, PW1 took 25 replicate and random samples (0.3523g) to conduct the quantitative analysis using the Gas Chromatography with flame ionic detector ('GC-Fid'). Since the samples used by PW1 for the three colour tests, the GCMS test and the GC-FID test were taken at random from the homogenised crystalline substance, these samples were actually samples which were representative of the whole bulk of the homogenised crystalline substance. Thus, in effect PW1 had analysed all the homogenised crystalline substance.

[28] On PW1's standing as an expert, from his evidence, we find that after obtaining his BSc (Hons) degree from University Kebangsaan Malaysia in

1991, he had been working with the chemistry department in Kota Kinabalu since 1992. He was a member of the Institute of Chemists and he had attended on the job training in the analysis of dangerous drugs, including methamphetamine. He had, since June 1992 been conducting analysis of methamphetamine. Up to 8 May 2002, he had conducted analysis of methamphetamine in 3,500 cases. He had given evidence in the High Court, as well as the lower court and as far he knew, his evidence had been accepted.

[29] We find that PW1 was never cross-examined at all on the aspects of his evidence which we have set out. For convenience the proceeding relating to cross-examination of PW1 is reproduced below:

Q: Are those 11 plastic bags with smooth surfaces

A: Yes

Q: Was it easy to lift finger prints from such surface

A: Beyond my expertise, I do not know

Q: Both machine — have to be sent for examination and approval before you can use them.

A: No need

Q: Are you sure they do not have to be annually tested and approved.

A: Yes

Q: Have you got a certificate with you that they have been tested for use by your department.

A: I do not have.

Q: Machines ever sent for testing and approval.

A: I do not know.

Q: Are those 11 plastic bags 'jernih'.

A: Yes

Q: P4 (chemist report) 4th para, — Ketulan ... analisis — you mixed all the 11 packets A1 — 11 together and have them blended

A: Yes

[30] It is plain that PW1 was never questioned at all about the various tests which he did. It was never put to him that the tests which he had carried out were wrong or inaccurate. He was not asked at all about the homogenisation process that he had done. He was not asked about the samples which he had taken. He was not questioned at all, and it was never even put to him that the samples he had taken were inadequate or not representative of the whole

bulk of the crystalline substance. He was not questioned at all about his eventual conclusion that the 487.0928g of crystalline substance in this case contained 370.2g methamphetamine. It was never put to him that his conclusion about the weight of methamphetamine in this case was wrong or inaccurate in any way.

[31] We also find that PW1's evidence in the case is more detailed than the chemist's evidence in *Munusamy* and *Lam San*. In the circumstances as aforesaid, considering PW1's evidence in totality, we cannot see how his evidence can be held to be inherently incredible. In the absence of any rebuttal evidence by the defence and in the light of the authorities which we have dealt with at length, we cannot accept the learned judge's conclusion on the inadequacy of PW1's evidence. We are satisfied that the learned judge's failure to accept PW1's evidence, including the latter's conclusion on the weight of methamphetamine in this case was a serious misdirection, resulting in his erroneous eventual conclusion that the prosecution had failed to establish a prima facie case. In our judgment, if the learned judge had not misdirected himself in the way which we have explained, he would not have made the order acquitting and discharging the respondent in this case.

[32] For the reasons which we given, we found that the order by the learned judge cannot be upheld. It was set aside. We ordered that the case be remitted to the same judge with a direction to him to call upon the accused to enter on his defence on the charge of trafficking.

Appeal allowed.

Reported by Brendan Navin Siva